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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1908

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS and GEORGE P. JENKINS, All Being Directors of BETHLEHEM STEEL CORPORATION, and

BETHLEHEM STEEL CORPORATION,

Petitioners

v.

RICHARD A. ASH, On Behalf of Himself, and on Behalf of BETHLEHEM STEEL CORPORATION

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR COMMON CAUSE AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF FOR COMMON CAUSE AS AMICUS CURIAE

Pursuant to Rule 42 of the Rules of this Court, Common Cause moves the Court for leave to file the appended brief *amicus curiae* supporting the position of respondent. The consent of the parties to file such brief has been sought and was given by respondent* but refused by petitioners.

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* A copy of respondent's consent is being filed herewith.

On January 13, 1975, the United States Chamber of Commerce was granted leave to file an *amicus curiae* brief in support of petitioners.

Common Cause is a non-profit District of Columbia corporation, organized to promote on a nonpartisan basis social welfare and civil betterment in the United States. Among its major purposes is to facilitate achievement of these objectives by making government more responsive to public needs and demands through reform of the political processes. It has in excess of 300,000 dues-paying members in the several states and the District of Columbia. Its membership includes citizens of the United States who have been and intend to be: (a) registered voters for election of candidates for federal elective office; (b) contributors of lawful amounts to political committees which accept contributions and make expenditures for the purpose of influencing the election of candidates for federal elective office; (c) active participants in support of the election of candidates for federal elective office.

Common Cause members lobby their Senators and Representatives and are represented before legislative bodies by Common Cause, which is registered as a lobbying organization pursuant to the Federal Regulation of Lobbying Act. In its efforts to protect the interests of its members in a fair and open political process, Common Cause has filed a number of lawsuits directed at securing full compliance with laws regulating the conduct of those in the political arena. The doctrine of implied civil remedies has been a central issue in several of those cases. In *Common Cause* v. *Democratic National Committee*, 333 F. Supp. 803 (D.D.C. 1971), a district court inferred a private right of action on behalf of Common Cause members for the enforcement of 18 U.S.C. §§ 608 and 609. In that case, Common Cause sued to prevent the Democratic, Republican, and Conservative Party committees from evading the statutory limits on contributions and expenditures for federal election campaigns. In another case, a district court inferred a private right of action for the enforcement of the disclosure provisions of the Corrupt Practices Act of 1925, 43 Stat. 1070, *Common Cause* v. *Finance Committee to Re-Elect the President*, CA 1780-72 (D.D.C., filed 1972). In that case, Common Cause, on June 24, 1973, secured an order compel-

ling the defendant to comply with the statutory provisions governing disclosure of campaign contributions and expenditures. As a result of that lawsuit, secret sources of over $20,000,000 in contributions in the 1972 Presidential campaign were made public. These disclosures, which revealed a continuing pattern of illegality, gave impetus to both judicial and legislative efforts to cleanse the electoral process. Attorneys for Common Cause are currently engaged in another such action, *Common Cause* v. *National Association of Manufacturers*, CA 74-1114 (D.D.C., filed July 25, 1974), in which the plaintiffs seek to compel compliance with the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261 *et seq.* In that case, Common Cause asserts the interests of registered voters, of constituents of Members of Congress, and of registered lobbyists. It claims that the defendant's failure to comply with the Act's registration requirements constitutes an injury to its interest in the integrity of the legislative process. The outcome of the instant case may well, as a practical matter, determine whether Common Cause will be able to secure compliance with the Lobbying Act.

This case is of great importance to the future of Common Cause's ability to sue to compel compliance with statutes enacted to protect the class of persons which includes Common Cause members, and thus should be decided only after careful consideration of the views of Common Cause, which will certainly be affected by the disposition of this case.

The position taken in Common Cause's brief is that the doctrine of implied civil remedies has a long history in our law, and that the reasons for the rule's evolution compel its application in this case. In addition, we suggest that the key to the doctrine, as established by this Court, is the need for civil relief to ensure compliance with law. It is our position that, with regard to legislation safeguarding the integrity of the political process, including 18 U.S.C. § 610, public enforcement efforts have been negligible, and a private right of action is essential to the effectiveness of such statutes.

This position, which is more fully discussed in our brief, has not been and is unlikely to be briefed by the parties. We believe that it is desirable for the Court to have before it expositions of all the relevant considerations before it decides under what circumstances private rights of action can be inferred from criminal statutes. The brief of Common Cause will discuss in detail the shortcomings of public enforcement, an issue that is otherwise unlikely to be presented, and it is primarily to bring this issue before the Court that leave to file a brief *amicus curiae*, urging affirmance, is sought.

Respectfully submitted,

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INDEX

Page

INTEREST OF THE *Amicus Curiae* 1

SUMMARY OF ARGUMENT 1

ARGUMENT:

THE COURT OF APPEALS CORRECTLY HELD THAT SHAREHOLDERS OF A CORPORATION WHOSE FUNDS HAVE BEEN UNLAWFULLY EXPENDED IN VIOLATION OF 18 U.S.C. § 610 HAVE AN IMPLIED CIVIL CAUSE OF ACTION AGAINST THE RESPONSIBLE CORPORATE OFFICIALS 5

A. THERE IS A LONG HISTORY OF PRECEDENTS FOR THE PROPOSITION THAT PENAL STATUTES MAY AUTHORIZE PRIVATE CIVIL ACTIONS BY IMPLICATION .. 7

B. THE CRITERIA SUGGESTED BY THIS COURT FOR DETERMINING WHEN A CIVIL REMEDY IS IMPLIEDLY AUTHORIZED BY A PENAL ENACTMENT ARE MET IN THIS CASE 16

C. THE INFERENCE OF A CIVIL REMEDY IS PARTICULARLY APPROPRIATE IN THE CASE OF A STATUTE, LIKE § 610, THAT IS DESIGNED TO PRESERVE THE INTEGRITY OF THE ELECTORAL PROCESS, SINCE EXPERIENCE TEACHES THAT SUCH STATUTES ARE UNLIKELY TO BE EFFECTIVELY ENFORCED 24

D. THERE ARE NO COUNTERVAILING REASONS FOR NOT INFERRING A CIVIL REMEDY HERE 28

1. THAT CONGRESS, IN TITLE III OF THE FEDERAL ELECTION CAMPAIGN ACT OF 1971, PROVIDED AN EXPRESS CIVIL REMEDY FOR VIOLATION OF THAT TITLE'S PROVISIONS, BUT IN TITLE II, THOUGH IT AMENDED § 610, DID NOT SIMILARLY PROVIDE A CIVIL REMEDY FOR ITS BREACH, IS NOT A VALID BASIS FOR INFERRING, UNDER THE *"expressio unius"* RULE OF CONSTRUCTION, THAT CONGRESS INTENDED THAT VIOLATION OF § 610 SHOULD BE IRREMEDIABLE CIVILLY 28

Page

2. Such light as is thrown by the Federal Election Campaign Act Amendments of 1974 on Congress' intent as to § 610 when it enacted Titles II and III of the 1971 Act refutes rather than supports the *"expressio unius"* claim based on those Titles . 34

Conclusion 39

CITATIONS

Cases: Page

Allen v. *State Board of Elections*, 393 U.S. 544 (1969) 2, 18, 20, 21, 22, 28
Anonymous, 6 Mod. 26, 87 Eng. Rep. 791 (Q.B. 1703) . 7, 8
Ash v. *Cort*, 350 F. Supp. 227 (E.D. Pa. 1972)..... 16
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 (1936) 7
Baker v. *Carr*, 369 U.S. 186 (1962) 15
Belardino v. *Murphy*, 364 F. Supp. 1223 (S.D.N.Y. 1972) 13
Bell v. *Hood*, 327 U.S. 678 (1946) 7, 19
Bivens v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) 22, 39
Burke v. *Compania Mexicana De Aviacion, S.A.*, 433 F.2d 1031 (9th Cir. 1970) 10
Case Co., J. I. v. *Borak*, 377 U.S. 426 (1964) .. 2, 11, 17, 18. 19, 20, 22, 28
Colonial Realty Corp. v. *Bache & Co.*, 358 F.2d 178 (2d Cir.), certiorari denied, 385 U.S. 817 (1966) 10
Common Cause v. *Democratic National Committee*, 333 F. Supp. 803 (D.D.C. 1971) 14, 15, 16, 17, 19, 22
Conley v. *Gibson*, 355 U.S. 41 (1957) 6
Couch v. *Steel*, 3 E. & B. 402, 118 Eng. Rep. 1193 (Q.B. 1854) 7, 8
Fagot v. *Flintkote Company*, 305 F. Supp. 407 (E.D.La. 1969) 14
Farmland Industries, Inc. v. *Kansas-Nebraska Naturcl Gas Co., Inc.*, 349 F. Supp. 670 (D. Neb. 1972), affirmed, 486 F.2d 315 (8th Cir. 1973) 16

Page

Fischman v. *Raytheon Mfg. Co.*, 188 F. 2d. 783 (2d Cir. 1951) 11
Fitzgerald v. *Pan American World Airways*, 229 F.2d 499 (2d Cir. 1956) 12
Goldstein v. *Groesbeck*, 142 F.2d 422 (2d Cir.), certiorari denied, 323 U.S. 737 (1944) 12
Gomez v. *Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969) 13
Hoellen v. *Annunzio*, 348 F. Supp. 305 (N.D. Ill. 1972), affirmed, 468 F.2d 522 (7th Cir. 1972), certiorari denied, 412 U.S. 953 (1973) 13
Holloway v. *Bristol-Myers Corporation*, 485 F.2d 986 (D.C Cir. 1973) 33
Hooper v. *Mountain States Securities Corp.*, 282 F.2d 195 (5th Cir. 1960) 11
Kardon v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946) 11, 12, 18
Levy v. *Abzug*, 355 F. Supp. 1299 (S.D.N.Y. 1972) 13
Marbury v. *Madison*, 1 Cranch 137 (1803) 7
Michigan National Bank v. *Michigan*, 365 U.S. 467 (1961) 34
Mortimer v. *Delta Air Lines*, 302 F. Supp. 276 (N.D. Ill. 1969) 12
Nader, Ralph, et al. v. *John N. Mitchell, et al.*, Civ. Action No. 243-72 (D.D.C. 1972) 25
National Association for Community Development v. *Hodgson*, 356 F. Supp. 1399 (D.D.C. 1973) 16, 22
National Railroad Passenger Corp. v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974) ..28, 29, 30, 32, 38, 39
Neiswonger v. *Goodyear Tire & Rubber Co.*, 35 F.2d 761 (N.D. Ohio 1929) 9
Pipefitters v. *United States*, 407 U.S. 385 (1972) 34
Reitmeister v. *Reitmeister*, 162 F.2d 691 (2d Cir. 1947) .. 13
Rising v. *Brown*, 313 F. Supp. 824 (C.D. Cal. 1970) 13
Roosevelt Field v. *Town of North Hempstead*, 84 F. Supp. 546 (E.D. N.Y. 1949) 9

Page

Schiaffo v. *Helstoski*, 492 F.2d 413 (3d Cir. 1974) 13
Steele v. *Louisville & N. R. Co.*, 323 U.S. 192 (1944) 11
Stewart v. *Travelers Corporation*, 503 F.2d 108 (9th Cir. 1974) 14, 38
Straus v. *Gilbert*, 293 F. Supp. 214 (S.D.N.Y. 1968).... 13
Tax Analysts and Advocates v. *Shultz*, 376 F. Supp. 889 (D.D.C. 1974) 16
Texas & New Orleans Railroad Co. v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930) 10
Texas & Pacific Railway v. *Rigsby*, 241 U.S. 33 (1916) 2, 8, 9, 13, 14, 20
T.I.M.E., Inc. v. *United States*, 359 U.S. 464 (1959) 33
Tunstall v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944) 11
United States v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) 34
United States v. *Auto Workers*, 352 U.S. 567 (1957) ...6, 7, 23
Van Hecke v. *Reuss*, 350 F. Supp. 21 (E.D. Wis. 1972) .. 13
United States v. *C.I.O.*, 335 U.S. 106 (1948)..... 6, 23
Wills v. *Trans World Airlines*, 200 F.Supp. 360 (S.D. Cal. (S.D. Cal. 1961) 12
Wyandotte Transportation Co. v. *United States*, 389 U.S. 191 (1967) 2, 19, 20, 22, 28, 38

STATUTES:

Air Commerce Act of 1926 9

Consumer Credit Protection Act of 1968, § 304(a), 15 U.S.C. § 1674(a) 14

Corrupt Practices Act of 1925:
Generally 2
§ 313 23

Fair Labor Standards Act, § 15, 29 U.S.C. § 215 14

Federal Aviation Act 12

Federal Communications Act, 47 U.S.C. § 605 13

Page

Federal Election Campaign Act of 1971, Public Law 92-225, 86 Stat. 3:
Title II 4, 5, 28, 30, 31, 34, 37
Title III, 2 U.S.C. § 431 *et seq.* 4, 5, 28, 30, 32, 34, 37
§ 203 15
§ 204 15
§ 301(g), 2 U.S.C. § 431(g) 31
§ 308(d)(1), 2 U.S.C. § 438(d)(1) 30, 36
§ 308(d)(2)-(5), 2 U.S.C. § 438(d)(2)-(5) 31
§ 311, 2 U.S.C. § 441 31

Federal Election Campaign Act of 1971, Public Law 92-225, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, Public Law 93-443, 88 Stat. 1263:
Title III 34, 35, 36, 37
§ 310(a) 26, 35
§ 310(b) 35
§ 314(a)(1)(A) 35, 37
§ 314(a)(2) 35
§ 314(a)(5) 35
§ 314(a)(6) 35
§ 314(a)(7) 36, 37
§ 314(a)(8)-(11) 36
§ 315(a) 36

Federal Election Campaign Act Amendments of 1974, Public Law 93-443, 88 Stat. 1263:
§ 101(a) 15
§ 101(e)(1) 34
§§ 201-210 34
§ 208(a) 26
§ 410 34

Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270 27

Federal Safety Appliance Act 9

Page

Interstate Commerce Act:
Part I 33
Part II (Motor Carrier Act of 1935) 33
Part III 33

Motor Carrier Act of 1935 (Part II of Interstate Commerce Act) 33

Public Utility Holding Company Act 12

Rail Passenger Service Act of 1970, 84 Stat. 1327, 45 U.S.C. § 501 *et seq.*:
Generally 29
§ 307(a), 45 U.S.C. § 547(a) 29

Railway Labor Act of 1926 10

Rivers and Harbors Act of 1899:
§ 15, 33 U.S.C. § 409 19
§ 16, 33 U.S.C. § 411 19
§ 19, 33 U.S.C. § 414 19
§ 20, 33 U.S.C. § 415 19

Securities Exchange Act of 1934:
§ 9, 15 U.S.C. § 78i 11
§ 10(b), 15 U.S.C. § 78j(b) 11
§ 14(a), 15 U.S.C. § 78n(a) 12, 17, 18
§ 16, 15 U.S.C. § 78p 11
§ 18, 15 U.S.C. § 78r 11
§ 27, 15 U.S.C. § 78aa 17, 18
§ 32, 15 U.S.C. § 78ff 17

18 U.S.C., chap. 29 35

18 U.S.C. § 608 ..... 15, 35

18 U.S.C. § 609 15

18 U.S.C. § 610 ..... 2, 4, 5, 6, 7, 16, 23, 24, 28, 30, 31, 32, 34, 35, 36, 37, 38

18 U.S.C. § 611 35

18 U.S.C. § 613 35

18 U.S.C. § 614 35

Page

18 U.S.C. § 615 35

18 U.S.C. § 616 35

18 U.S.C. § 617 35

39 U.S.C. §§ 3210-3212 ..... 12, 13

Voting Rights Act of 1965:
Generally 28
§ 5, 42 U.S.C. § 1973c 20, 21, 22
§ 11, 42 U.S.C. § 1973i 21
§ 12(d), 42 U.S.C. § 1973j(d) 21

Wagner-Peyser Act, 29 U.S.C. § 49 *et seq.* 13

LEGISLATIVE MATERIALS:

Cong. Rec. H8523*ff.* (daily ed. August 16, 1974) 27

117 Cong. Rec. 29002 27

117 Cong. Rec. 29004 26

117 Cong. Rec. 43379-81, 43384-85 23

117 Cong. Rec. 43379-43391 32

Cutler, *Should We Have a Permanent Public Prosecutor?* (Outline of paper prepared for the Committee for Public Justice, appended to testimony by the author at Hearings before the Subcommittee on Separation of Powers, Committee on the Judiciary, United States Senate, 93d Cong., 2d Sess., on S.2803 and S.2978, March 26, 27, 28 and April 2, 1974) 24, 25

H.R. Rept. No. 93-1239, to accompany H.R. 16090, 93d Cong., 2d Sess. 27

H.R. Rept. No. 93-1438, 93d Cong., 2d Sess. 36

Hearings before the Committee on Standards of Official Conduct, House of Representatives, 91st Cong., 2d Sess., on H. Res. 1031, October 1, 7, and 8, 1970 ..... 27, 28

Page

Hearings before the Select Committee on Presidential Campaign Contributions, United States Senate, 93d Cong., 1st Sess., Book 13, November 7, 8, 13, 14, and 15, 1973 25

MISCELLANEOUS:

American Law Institute, *Restatement of Torts*, § 286 (1934) 9

3 Blackstone, *Commentaries*, 23 7

1 Com. Dig., *tit.* Action upon Statute (F), 318 (4th ed. 1800) 8

Rule 14a-9 of Securities and Exchange Commission, promulgated pursuant to § 14(a) of Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) 17

Williams, *The Effect of Penal Legislation in the Law of Tort*, 23 Mod. L. Rev. 233 (1960) 8

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INTEREST OF THE AMICUS CURIAE

The interest of the *amicus curiae* is stated in the motion, *ante*, for leave to file this *amicus* brief.

SUMMARY OF ARGUMENT

The court of appeals correctly held that shareholders of a corporation whose funds have been expended in violation of

18 U.S.C. §610 have an implied civil cause of action against the responsible corporate officials.

A. There is a long history of precedents for the proposition that penal statutes may by implication authorize private civil remedies for their violation. The doctrine, an ancient one with roots in the common law, is based on the fundamental general principle that wherever there is a legal right there is a legal remedy if the right is infringed. In this country, the history of the doctrine, under the leadership of this Court, has been one of expanding use. In its earliest application, the doctrine was used primarily in tort actions: the common law provided the basis for the claim and the statute supplied the standard of conduct. This Court first recognized the doctrine in such a case. *Texas & Pacific Railway* v. *Rigsby*, 241 U.S. 33 (1916). Sustaining a suit for damages brought by a railroad employee who had suffered injuries as a consequence of the railroad's failure to comply with a statutory duty, the Court enunciated as follows (citing the common law) the applicable principle: "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied * * * " (241 U.S. at 39-40).

In its more modern application, the doctrine has been used where a statute creates a new right: the statute makes certain behavior unlawful and the court fashions a civil remedy for an aggrieved member of the class for whose protection the statute was enacted. Federal courts have adopted this approach in a wide variety of situations.

B. In its more recent decisions applying the doctrine—*J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967), and *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969)—this Court has enunciated three basic criteria for determining whether a private civil remedy is impliedly authorized by a criminal enactment: (1) whether the plaintiff is within the class for whose benefit the statute was enacted, (2) whether the injury

suffered is of the type the statute was intended to protect against, and (3) whether the remedies explicitly prescribed are adequate to ensure full effectuation of the Act's purposes. Under these tests the present proceeding is a proper one for applying the doctrine. Respondent, as a registered voter and corporate shareholder, is within the classes which §610 was designed to protect. Since its enactment in 1907, the prohibition against corporate political contributions has been designed to protect both the rightful claim of the electorate to the allegiance of their elected representatives, by destroying the influence over elections which corporations would be able to exercise through financial contributions, and the right of shareholders to have their invested funds used solely for legitimate business purposes. The harm suffered by respondent is precisely the harm which §610 was intended to prevent. Corporate funds (the suit alleges) were used to influence public opinion in favor of a particular candidate, and respondent's share of the funds was used without his consent to aid a candidate whom he did not support. Finally, unless respondent is entitled to the relief he seeks, the statute's broad remedial purposes will not be effectuated.

C. The third of the mentioned criteria—whether the expressly provided criminal sanction will suffice to ensure full effectuation of the statute's purposes—is particularly pertinent in the case of an enactment, like §610, that is designed to preserve the integrity of the electoral process. Effective criminal enforcement of such statutes would concededly go a long way toward achievement of their remedial goals. The generally acknowledged and widely deplored fact is, however, that campaign financing laws, "corrupt practices" enactments, and similar statutes designed to maintain the purity of elections have rarely been criminally enforced. The reason is that an incumbent Attorney General has an obvious conflict of interest in investigating or prosecuting campaign violations by members of his own Administration or party. And because of the "live and let live" principle of elective politics in countries like the United States in which there are frequent transfers of power,

the same conflict of interest affects cases involving members of the opposition party. Hence, unless laws of this type are construed as authorizing private civil remedies for their violation, they will not be effectively enforced at all—and will become to all intents and purposes "dead letters".

D. There are no countervailing reasons for not inferring a civil remedy here.

1. Petitioners' and Judge Aldisert's reliance on the rule of construction *"Expressio unius est exclusio alterius"*, as the basis for their conclusion that Congress intended that violation of §610 should be civilly irredressable, is misplaced. They rely on the fact that Congress, in Title III of the Federal Election Campaign Act of 1971 ("FECA"), provided an express civil remedy for violation of that Title's substantive provisions, but in Title II, though it amended §610, did not similarly provide a civil remedy for breach of it. But Title III, which made no reference to § 610, was a comprehensive, carefully integrated, and largely new set of provisions relating to the reporting and disclosure of campaign contributions and expenditures. The sole provision claimed to be relevant created a public civil remedy (a suit by the Attorney General) for violation of the Title's substantive directives. Title II, on the other hand, did not purport to establish any comprehensive, or new, or self-contained body of rules on any subject. It merely amended in various respects, as its caption indicates it was designed to, a miscellany of Criminal Code sections. Its sole alleged pertinence lies in the fact that § 610 was one of the sections so amended—the amendment consisting of the addition of a new paragraph codifying existing case law as to the meaning of a phrase used in the Section. Since the amendment of § 610 which Title II effected was in no way concerned with considerations relating to remedies or remediability, there is simply no warrant for the view that Congress meant to imply by anything said in the Titles that there should be no civil remedy for violation of § 610.

2. Nothing in the Federal Election Campaign Act Amendments of 1974 ("FECA Amendments") reinforces the claim, based on the *expressio unius* maxim, that Congress meant that violation of § 610 should be civilly irremediable. Indeed the FECA Amendments (which are inapplicable to this lawsuit because they were enacted after the court of appeals' decision) tend to refute rather than bolster that claim. The 1974 Amendments, so far as relevant, in effect extended the public civil remedy provisions of Title III of the 1971 Act to cover violations of § 610 (and certain other Criminal Code sections) as well as to violations of the 1971 Act proper. This hardly suggests that Congress, in 1971, in enacting Titles II and III, impliedly intended that violations of § 610 were to be civilly irredressable—the basic *expressio unius* argument. The more reasonable inference is that Congress, in 1971, simply did not consider § 610 from the standpoint of remedies or remediability; and that later, in 1974, when it addressed the specific issue, it decided to make the civil remedy provisions of Title III of the 1971 Act applicable to violations of § 610 as well.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT SHAREHOLDERS OF A CORPORATION WHOSE FUNDS HAVE BEEN UNLAWFULLY EXPENDED IN VIOLATION OF 18 U.S.C. § 610 HAVE AN IMPLIED CIVIL CAUSE OF ACTION AGAINST THE RESPONSIBLE CORPORATE OFFICIALS

Introductory Note

This brief is addressed solely to the issue of whether the court of appeals erred in determining that a private civil cause of action is impliedly created by 18 U.S.C. § 610. Although petitioners seek this Court's determination of both the scope and the constitutionality of § 610, the Court should decline to address those questions at this time.

The pleadings in this case do not provide an adequate basis on which to determine whether the advertisement in question involved an illegal "expenditure" within the meaning of § 610.

It is true that this Court has twice ruled on the coverage of this and its predecessor statute. *United States* v. *C.I.O.*, 335 U.S. 106 (1948); *United States* v. *Auto Workers*, 352 U.S. 567 (1957). But those were criminal cases, and the indictments were drawn with the particularity due process requires. The case at bar is civil, and the pleadings provide only an outline of how the litigation will proceed. As this Court has noted:

> Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the [Federal] Rules [of Civil Procedure] to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.

Conley v. *Gibson*, 355 U.S. 41, 47-48 (1957). Without pretrial discovery and a factual adjudication in the district court, it will not be possible for this Court to decide whether petitioners' actions violated the statute or whether the statute is constitutional.

Important questions are unanswered at this stage in the litigation. Was the advertisement in question paid for by the petitioners at the suggestion or request of a candidate or his staff? Was the advertisement intended to influence voters either for or against a political candidate? In an age of sophisticated public relations, the Court must look beyond the face of the advertisement, which admittedly mentions no names and contains no pictures of individual candidates. These questions are highly relevant to both the scope and constitutionality of § 610. For this Court to decide those issues at this early stage of the proceeding would be tantamount to issuing an advisory opinion, in contravention of the settled constitutional rule prohibiting such opinions.

This Court faced a similar situation in *United States* v. *Auto Workers*, *supra*, where the Court found § 610 to apply to the conduct alleged in the indictment, but declined to decide the statute's constitutionality. Mr. Justice Frankfurter wrote for the Court:

> The impressive lesson of history confirms the wisdom of the repeated enunciation, the variously expressed admonition, of self-imposed inhibition against passing on the validity of an Act of Congress "unless absolutely necessary to a decision of the case." [citation omitted]
>
> * * * * * * * * * *
>
> Refusal to anticipate constitutional questions is peculiarly appropriate in the circumstances of this case. First of all, these questions come to us unillumined by the consideration of a single judge—we are asked to decide them in the first instance. Again, only an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision. Finally, by remanding the case for trial, it may well be that the Court will not be called upon to pass on the questions now raised. * * *

Id. at 590-592. By declining to rule now on the scope and constitutionality of § 610, the Court may avoid the necessity of such a ruling entirely or may postpone the ruling until a more complete record is available. This course would be in keeping with the long-standing tradition of this Court. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 345 (1936) (Mr. Justice Brandeis, concurring).

A. There Is a Long History of Precedents for the Proposition That Penal Statutes May Authorize Private Civil Actions by Implication

The doctrine of implied civil remedies is based on the " 'general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded.' " *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803) (quoting with approval 3 Blackstone, *Commentaries*, 23); *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). This reservoir of judicial power stems from jurisdiction over a case and from an allegation that a legislatively protected interest has been disregarded. The doctrine is an ancient one, with roots in the common law. Cf. *Anonymous*, 6 Mod. 26, 87 Eng. Rep. 791 (Q.B. 1703); *Couch* v. *Steel*, 3 E. & B. 402, 118 Eng. Rep. 1193

(Q.B. 1854); 1 Com. Dig., *tit.* Action upon Statute (F), 318 (4th ed. 1800). Thus Chief Justice Holt ruled in *Anonymous, supra,* that:

> [W]herever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute * * *.

6 Mod. at 26-27, 87 Eng. Rep. at 791. And in *Couch* v. *Steel, supra,* it was held that a seaman who had been injured because a shipowner had failed to comply with a statute that required certain medicines to be kept on board ship was entitled to sue civilly for damages, notwithstanding that the statute made the default a penal offense and made no provision for a civil remedy by one hurt by it. "Upon principle then, as well as upon authority, as far as we have been able to find any upon the point," the court concluded (citing, *inter alia,* Comyns' *Digest, supra* [which in turn had invoked the authority of *Anonymous, supra*]),

> we think * * * that the plaintiff's right, by the common law, to maintain an action on the case for special damage sustained by the breach of a public duty is not taken away by reason of the statute which creates the duty imposing a penalty * * *.

3 E. & B. at 415, 118 Eng. Rep. at 1198.

In this country, the history of the doctrine, under the aegis of this Court, has been one of expanding use.[1] In its earliest application, the doctrine was used primarily in tort actions. In theory, the common law provided a basis for the claim, and the statute merely supplied a required standard of conduct. This Court first recognized the doctrine in such a case. *Texas & Pacific Railway* v. *Rigsby,* 241 U.S. 33 (1916). Considering a suit for damages brought by a railroad employee who had

[1] For a discussion of the modern English precedents in the field, see Williams, *The Effect of Penal Legislation in the Law of Tort,* 23 Mod. L. Rev. 233 (1960).

been injured in falling from one of the company's cars, the Court noted that under the Federal Safety Appliance Act all such cars were required to be equipped with secure handholds or "grab irons" and that a defect in such equipment had caused the injury in question. To the railroad's argument that violation of the statutory requirements, even if applicable in this instance, would subject the railroad only to the penal provisions of the Act and not to civil liability, the Court, harkening back to tort law principles, held that a cause of action would lie:

> None of the Acts [the basic Safety Appliance Act and later amendments of it], indeed, contains express language conferring a right of action for the death or injury of an employee; but the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the Employers' Liability Act, has never been doubted.

Id. at 39. In essence, the Court found that the statute designated both a class of potential plaintiffs and a standard of care which was owed to such individuals in the operation of the railroad, and articulated, as follows, the basic applicable principle:

> A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law * * * [citing Comyns, *supra,* and *Anonymous, supra*]. This is but an application of the maxim, *Ubi jus ibi remedium* [citing, *inter alia, Couch* v. *Steel, supra*].

Id. at 39-40. See also *Neiswonger* v. *Goodyear Tire & Rubber Co.,* 35 F.2d 761 (N.D. Ohio 1929) (private suit based upon violation of regulations promulgated under the Air Commerce Act of 1926, establishing lawful flying altitudes); *Roosevelt Field* v. *Town of North Hempstead,* 84 F.Supp. 456 (E.D.N.Y. 1949) (private suit based upon violation of Civil Aeronautics Board regulations for construction of water tanks). And see American Law Institute, *Restatement of Torts,* § 286 (1934).

In its more modern application, the doctrine of implied civil remedies has been used where a statute creates a new right. In effect, the statute declares certain behavior unlawful, and the court fashions a civil remedy, for the benefit of the suing member of the class of persons intended to be protected, in addition to the legislatively prescribed remedies (if any) to enforce the right created. As Judge Friendly stated in *Colonial Realty Corp.* v. *Bache & Co.*, 358 F.2d 178, 182 (2d Cir.), certiorari denied, 385 U.S. 817 (1966), "The case for implication would be strongest when the rule imposes an explicit duty unknown to the common law." Federal courts have followed this approach in a wide variety of situations.

In *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930), this Court inferred a cause of action from a provision of the Railway Labor Act of 1926 which prohibited coercion in the selection of bargaining representatives in labor negotiations. In the absence of any penal or civil enforcement provisions, the Court upheld an injunction issued by the trial court at the request of a labor union, observing:

> The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. In the case of the statute in question, there is an absence of penalty, in the sense of specially prescribed punishment, with respect to the arbitral awards and the prohibition of change in conditions pending the investigation and report of an emergency board, but in each instance a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each. The same is true of the prohibition of interference or coercion in connection with the choice of representatives. The right is created and the remedy exists. *Marbury* v. *Madison*, 1 Cranch 137, 162, 163.

Id. at 569-570. See also *Burke* v. *Compania Mexicana De Aviacion, S.A.*, 433 F.2d 1031 (9th Cir. 1970), where the court

inferred a cause of action for an individual employee under the same section of the Act. And in *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944), this Court inferred a civil cause of action under another section of the Act, requiring labor unions, when acting as bargaining representatives, to represent all the employees within the working unit to which its members belong. Although the section provided only for criminal penalties, the Court held that Negro firemen had an implied cause of action to enjoin a union from refusing to represent them. See also *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192 (1944).

Securities law has long been a fertile area for the inference of civil remedies. Federal courts have allowed private damage actions for penal violations of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (prohibiting manipulative or deceptive practices in the purchase or sale of securities), both for the benefit of defrauded sellers, *Kardon* v. *National Gypsum Co.*, 69 F.Supp. 512 (E.D.Pa. 1946); *Hooper* v. *Mountain States Securities Corp.*, 282 F.2d 195 (5th Cir. 1960), and for the benefit of defrauded purchasers, *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir. 1951), notwithstanding the absence of any provision in the Act authorizing such private remedies.[2] And in *J. I. Case Co.* v. *Borak*, 377

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[2] *Kardon*—a decision which the Fifth Circuit, in *Hooper*, described as "the trail-blazer decision" in the field of securities law and implied civil remedies (282 F.2d at 201)—noted that, while the legislature "[o]f course • • • may withhold from the parties injured the right to recover damages by reason of violation of a statute," the right "is so fundamental and so deeply ingrained in the law that where it is not expressly denied the intention to withhold it should appear very clearly and plainly" (69 F.Supp. at 514). The court, significantly, found no sufficient evidence of a legislative intent to withhold the private right of action there relied on in the fact that other sections of the Act (§§ 9, 16, and 18, 15 U.S.C. §§ 78i, 78p, and 78r), each making a defined type of conduct illegal, expressly provided for civil actions by the victims of such conduct. These other provisions had been relied on by the defendants in *Kardon* for their claim that § 10(b) (which contained no comparable provision) had

U.S. 426 (1964)—a decision we shall consider in more detail *infra*—this Court inferred a right to bring a civil cause of action based on alleged violation of another section of the same Act (§ 14(a), 15 U.S.C. § 78n(a)). *Borak*, indeed, would appear to have laid to rest any question as to the existence of implied civil remedies in the field of securities law.[3]

Several courts have held that the criminal antidiscrimination provisions of the Federal Aviation Act implied civil remedies in cases where passengers on oversold flights had been "bumped' 'in favor of other passengers. In addition to criminal penalties, the statute provides for prospective administrative action, *i.e.* the Civil Aeronautics Board can issue orders compelling future compliance. Notwithstanding these specifically prescribed remedies, however, a right to sue for damages was inferred in favor of the passengers who had been "bumped". See *Fitzgerald* v. *Pan American World Airways*, 229 F.2d 499 (2d Cir. 1956); *Wills* v. *Trans World Airlines*, 200 F.Supp. 360 (S.D.Cal. 1961); *Mortimer* v. *Delta Air Lines*, 302 F.Supp. 276 (N.D.Ill. 1969).

The congressional franking privilege statutes, 39 U.S.C. §§ 3210-3212, are other examples of federal regulatory enactments violation of which may be civilly redressed. The courts

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not been intended by Congress to confer such a right of action impliedly. The court, while conceding that the defendant's argument was "not without force," concluded that it lacked the persuasiveness needed to overcome the inference that a legislature which has proscribed defined activity for the benefit of a particular group intends that members of the group shall have the right to sue civilly to enforce their rights. *Ibid.* The court also noted that if "the whole question [were] one of statutory interpretation it [the defendants' argument] might be convincing," but that "the question is only partly such." *Ibid.*

[3] See also *Goldstein* v. *Groesbeck*, 142 F.2d 422 (2d Cir.), certiorari denied, 323 U.S. 737 (1944), where a shareholder was permitted to base a derivative suit on the provision of the Public Utility Holding Company Act prohibiting unregistered holding companies from entering into construction or service contracts.

uniformly hold that candidates for election to Congress may secure injunctive relief against violations of these statutes by their incumbent opponents. See, *e.g.*, *Schiaffo* v. *Helstoski*, 492 F.2d 413 (3d Cir. 1974); *Belardino* v. *Murphy*, 364 F. Supp. 1223 (S.D.N.Y. 1972); *Hoellen* v. *Annunzio*, 348 F. Supp. 305 (N.D.Ill. 1972), affirmed, 468 F.2d 522 (7th Cir. 1972), certiorari denied, 412 U.S. 953 (1973); *Rising* v. *Brown*, 313 F.Supp. 824 (C.D.Cal. 1970). And see *Levy* v. *Abzug*, 355 F.Supp. 1299 (S.D.N.Y. 1972); *Van Hecke* v. *Reuss*, 350 F. Supp. 21 (E.D.Wis. 1972); *Straus* v. *Gilbert*, 293 F.Supp. 214 (S.D.N.Y. 1968) (recognizing the power to enjoin but denying relief on the merits).

In *Reitmeister* v. *Reitmeister*, 162 F.2d 691 (2d Cir. 1947), the Second Circuit inferred a right to maintain a private cause of action for damages for injury resulting from violation of the Federal Communications Act, 47 U.S.C. § 605, prohibiting the unauthorized interception and use of telephone communications. Although the statute provides criminal penalties only, the court, in an opinion by Judge Learned Hand, allowed a private action by the person whose conversation had been intercepted, concluding that:

> [W]e can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal.

Id. at 694. Applying a similar test, the Fifth Circuit, in *Gomez* v. *Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969), allowed a private right of action in favor of migratory farm workers as beneficiaries of the Wagner-Peyser Act, 29 U.S.C. § 49 *et seq.* Even though a civil remedy was provided in the statute (the Secretary of Labor could prospectively cut off funds to states which directed workers to jobs where the working conditions were substandard), this was found inadequate to achieve the legislative objective. Invoking the rationale of this Court's decision in *Texas &*

Pacific Railway v. *Rigsby, supra,* and noting that the principle of that decision had been applied by the lower courts in a wide range of regulated areas, the court concluded that the Act and implementing regulations called "imperatively for implied remedies" if the law's objective, the protection of workers, was to be achieved (417 F.2d at 576).

In *Stewart* v. *Travelers Corporation,* 503 F.2d 108 (9th Cir. 1974), the Ninth Circuit held that an employee who had allegedly been discharged in violation of § 304(a) of the Consumer Credit Protection Act of 1968, 15 U.S.C. § 1674(a) (prohibiting dismissals due to single-debt wage garnishments), had an implied right to sue civilly for reinstatement and back pay. The court concluded that, unless there is clear congressional intent to the contrary, the right to private relief must be inferred from such a statute where this is necessary to ensure full effectuation of the legislative purpose (503 F.2d at 112). Similarly, in *Fagot* v. *Flintkote Company,* 305 F. Supp. 407 (E.D.La. 1969), the court allowed an employee, fired in violation of § 15 of the Fair Labor Standards Act, 29 U.S.C. § 215, to bring a private suit to recover damages for his loss of pension, life and health insurance, and salary. The court rejected the claim that plaintiff was required to depend upon criminal prosecution or civil action by the Secretary of Labor for vindication of his rights, concluding:

> [E]ffective implementation of a law prohibiting certain behavior includes recognition of a civil cause of action on the part of persons injured by the proscribed conduct. The general theoretical basis for inferring a right to sue where the statute is silent rests on the conviction that the protection given those persons for whose benefit the statute was enacted would be incomplete if it could be enforced only by criminal sanctions or by injunction obtained to protect the State's interests.

Id. at 410.

Finally, in *Common Cause* v. *Democratic National Committee,* 333 F.Supp. 803 (D.D.C. 1971), a decision particularly pertinent here because it too involved the integrity of

the electoral process, it was held that 18 U.S.C. §§ 608 and 609 (1970)[4] created implied civil remedies for their violation. These statutes prescribed criminal penalties for exceeding stated limits on individual contributions (§ 608), and for exceeding similarly prescribed limits on the receipt and expenditure of funds by political committees (§ 609), in connection with campaigns for elective federal office. The plaintiffs—consisting of this *amicus curiae,* its chairman, two incumbent Congressmen, and a number of individual citizens, voters, and campaign contributors and workers—had sought declaratory and injunctive relief against the Democratic and Republican National Committees, and the Conservative Party, to protect their private beneficial interests under the statutes, contending that the defendants had continually and with impunity been circumventing their provisions illegally over the years. Rejecting a claim that the plaintiffs lacked standing to maintain the suit, the court noted that:

> If John W. Gardner and other voters, contributors, and campaign workers, and Congressmen Bingham and Gude as candidates comply with Sections 608 and 609 while other candidates and their supporters do not, the votes of the plaintiffs and their efforts to effect the nomination or election of individuals are likely to be, as a practical matter, diluted or even nullified.

333 F.Supp. at 808. This sufficed to show, the court observed, that the plaintiffs were asserting, within the meaning of *Baker* v. *Carr,* 369 U.S. 186, 208 (1962),

> "'a plain, direct and adequate interest in maintaining the effectiveness of their votes' • • •, not merely a claim of 'the right, possessed by every citizen to require that the Government be administered according to law • • •.'"

Ibid. Satisfied from the legislative history of the statutes that persons in the plaintiffs' situation "were the intended

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[4] Section 608 has since been amended by the Federal Election Campaign Act of 1971, Public Law 92-225, § 203, 86 Stat. 9, and by the Federal Election Campaign Act Amendments of 1974, Public Law 93-443, § 101(a), 88 Stat. 1263. Section 609 has since been repealed by the 1971 Act, § 204, 86 Stat. 10.

beneficiaries of the statutes and comprise a class whose interests may be protected by a private civil action" (333 F.Supp. at 812), and noting that "the inability of the Justice Department to enforce these laws emphasizes both the inadequacy of relying upon criminal liability and the lack of reason to fear interference with criminal prosecutions" (*id.* at 813), the court concluded that:

> If the facts are as alleged, this is a flagrant and irreparable erosion of the right to an effective vote, and, in the absence of an express statutory provision to the contrary, clearly warrants immediate judicial relief.

Id. at 814.[5]

B. The Criteria Suggested by This Court for Determining When a Civil Remedy Is Impliedly Authorized by a Penal Enactment Are Met in This Case

It is apparent from what precedes that it is a well-settled principle, rooted in the common law and sanctioned by this Court, that a criminal statute can by implication grant to members of the class for whose protection it was enacted the right to private remedial relief for its infringement. It remains but to consider whether the court of appeals correctly held 18 U.S.C. § 610 to be such a statute. We submit that under the criteria suggested by this Court's recent decisions in the field that holding was correct and that the court of appeals,

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[5] The court, accordingly, denied motions to dismiss except as to the Congressmen-plaintiffs, whose suit, the court thought, for the reasons stated in the opinion (333 F.Supp. at 814), had been premature.

For decisions citing *Common Cause* with approval, see, *e.g.*, *Tax Analysts and Advocates* v. *Shultz*, 376 F.Supp. 889, 898-899 (D.D.C. 1974); *National Association for Community Development* v. *Hodgson*, 356 F.Supp. 1399, 1403 (D.D.C. 1973); *Ash* v. *Cort*, 350 F.Supp. 227, 231 (E.D.Pa. 1972) (the district court decision in this case); *Farmland Industries, Inc.* v. *Kansas-Nebraska Natural Gas Co., Inc.*, 349 F.Supp. 670, 678-679 n.1 (D. Neb. 1972), affirmed, 486 F.2d 315 (8th Cir. 1973).

consequently, correctly determined that respondent's suit had been improperly dismissed.

The first of this Court's recent decisions involving the doctrine of implied civil remedies was *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). There, a stockholder, suing derivatively, sought rescission of the merger of Case with another company on the ground that, in the solicitation of proxies for use at the stockholders' meeting at which the merger was voted, false and misleading statements had been made, in violation of § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), and Rule 14a-9 promulgated thereunder by the Securities and Exchange Commission. Section 14(a) made it unlawful for any person to solicit any proxy in contravention of any rule or regulation of the Commission, and Rule 14a-9 forbade false or misleading statements in proxy solicitations. Violation of any provision of the Act, or of any rule or regulation thereunder, was made criminally punishable (§ 32, 15 U.S.C. § 78ff), but neither § 14(a) nor any other provision of the Act expressly provided for a civil cause of action by one harmed by a § 14(a) violation. However, § 27 of the Act, 15 U.S.C. § 78aa, provided generally that the federal district courts should have jurisdiction of violations of the Act "and of all suits in equity and actions at law brought to enforce any liability or duty created by" the Act or regulations. The defendants, noting that § 14(a) did not expressly grant private rights of action thereunder, contended that § 27 merely conferred jurisdiction on the federal courts in proceedings under the Act and could not in itself be deemed to create such a right. This Court, sustaining the stockholder's right to sue, held that "[i]t appears clear that private parties have a right under § 27 to bring suit for violation of § 14(a) of the Act." *Id.* at 430-431.

It should be emphasized that, notwithstanding the Court's reference to § 27, the cause of action which *Borak* sustained was implied—as Judge Parker noted in *Common Cause* v. *Democratic National Committee*, *supra*, 333 F.Supp. at 810,

and as this Court itself recognized in *Allen* v. *State Board of Elections*, 393 U.S. 544, 557 (1969)—by § 14(a), not § 27. It was § 14(a) that created the duty, violation of which was held to be actionable by shareholders. Section 27 merely specified the forums in which rights defined or implied by other provisions of the Act could be litigated. That it was § 14(a) from which the right of action was inferred is clear from the Court's analysis. The Court observed that the purpose of § 14(a), as reflected by its legislative history, was to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation; noted that the section's broad remedial purposes were evidenced by the language of the section, which expressly referred to "the protection of investors"; and concluded that, while the section made "no specific reference to a private right of action," its reference to "the protection of investors" *"certainly implies the availability of judicial relief where necessary to achieve that result"* (377 U.S. at 431-432, emphasis added).

It should also be emphasized that certain sections of the Securities Exchange Act, unlike § 14(a), explicitly provide for private civil remedies for their violation (see §§ 9, 16, and 18, 15 U.S.C. §§ 78i, 78p, 78r). This Court apparently found this fact to be irrelevant to its construction of § 14(a), since the fact is mentioned nowhere in the *Borak* opinion. Cf. *Kardon* v. *National Gypsum Co.*, *supra*, 69 F.Supp. at 514, and discussion *supra*, pp. 11-12, n. 2.

In addition, the Court found that government enforcement of the Act was inadequate to protect stockholder interests. Noting that the Securities and Exchange Commission receives more proxy statements annually than it is able to analyze in depth, the Court observed that "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action." *Id.* at 432. Based on these and other considerations, the Court concluded:

> We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose. * * * It is for the federal courts "to adjust their remedies so as to grant the necessary relief" where federally secured rights are invaded.

Id. at 433, quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946).

Three years after *Borak*, this Court further elucidated the principle of implied civil remedies in *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967), a decision which, it has been suggested, contains this Court's "most definitive statement allowing civil relief for violation of criminal statutes." *Common Cause* v. *Democratic National Committee*, *supra*, at 810. In *Wyandotte*, and in a companion case consolidated for review, the Court considered actions brought by the United States against individuals who it claimed had been negligently responsible for the sinking of vessel in inland waterways. Section 15 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 409, declared unlawful the voluntary or negligent sinking of any vessel in such waters, and provided that the owner of any craft so sunk must commence its immediate removal; failure to do so would be considered abandonment and subject the craft to removal by the United States. The United States had sought a declaratory judgment in the companion case that the parties responsible for the sinking were responsible for removing the craft; in the principal case (*Wyandotte*) the United States had removed the vessel and sought to recover the costs from the parties it claimed had been responsible. Section 15 did not authorize civil suits to enforce its provisions or otherwise provide for the declaratory and monetary relief sought by the United States. Section 16 of the Act, 33 U.S.C. § 411, imposed criminal penalties upon persons who violated or abetted violation of § 15. Sections 19 and 20, 33 U.S.C. §§ 414, 415, permitted the United States a limited civil remedy: to dispose of such vessels and their cargoes and to retain any profits without liability to the owners.

The Court rejected the owners' contentions that, since injunctive and monetary relief was not included with the enumerated remedies for violation of the Act, such relief was not

available. Such an interpretation, the Court declared, would be "at variance with the purpose of" the statute, with the Court's own prior construction of the Act, and with the Court's prior decisions on analogous issues. *Id.* at 200. "There is no indication * * * in the legislative history of the Act, in the predecessor statutes, or in nonstatutory law," the Court noted, "that Congress might have intended that a party who negligently sinks a vesssel should be shielded from personal responsibility. We therefore hold that remedies and procedures specified by the Act for the enforcement of § 15 were not intended to be exclusive." *Id.* at 200-201. The Court recalled in this connection that in *Rigsby* and *Borak* it had concluded

> that criminal liability was inadequate to ensure the full effectiveness of the statute which Congress had intended. Because the interest of the plaintiffs in those cases fell within the class that the statute was intended to protect, and because the harm that had occurred was of the type that the statute was intended to forestall, we held that civil actions were proper.

Id. at 202.

It should be emphasized that, although the plaintiff in *Wyandotte* was the United States, the holding is fully applicable to the rights of private parties as well. In fact, the Court's articulated purpose was to extend to the government rights that plainly would have been available to private citizens under *Rigsby* and *Borak*. *Id.* at 202.

The most recent case on implied rights of action to come before this Court was *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969). Under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, any State covered by its provisions was restricted in denying the right to vote to any individual on the ground that he failed to comply with a voting qualification or prerequisite to voting different from that in force or effect on November 1, 1964. The State could do so only if (1) it had submitted the new enactment to the United States Attorney General and that official had not objected to the provision within sixty days, or (2) it had obtained a declaratory judg-

ment in the United States District Court for the "District of Columbia that the new provision did not have the purpose, and would not have the effect, of abridging the right to vote on account of race. Section 12(d) of the Act, 42 U.S.C. § 1973j(d), authorized the Attorney General to bring civil suits to enforce § 5. Any violation of the Act was expressly made a crime by § 11, 42 U.S.C. § 1973i.

Four suits had been brought by private citizens seeking declaratory judgments that various regulations governing voting practices and procedures fell within the provisions of § 5 and thus had to be submitted for review. The Act, however, did not authorize private declaratory judgment suits to enforce this approval procedure, and the Court therefore considered as a threshold question whether such private suits could be brought. Finding that the Voting Rights Act was drafted "to make the guarantees of the Fifteenth Amendment finally a reality for all citizens," the Court held that the appellants could seek not only declaratory judgments but also injunctions against enforcement of the state regulations without compliance with the procedural scheme set forth in § 5.

The Court made clear that one of the primary factors leading to the ruling was the lack of adequate federal resources for the enforcement of § 5. "The achievement of the Act's laudable goal could be severely hampered," it declared, "if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." *Id.* at 556. The Court noted that § 5 applied not only to the States but to their many political subdivisions and that each of these governmental units could issue regulations and enactments; it also noted that "[t]he Attorney General has a limited staff and often might be unable to uncover quickly" problems raised by such newly-enacted provisions, and that as of January 1968 the Attorney General had brought only one suit to force State compliance with § 5. *Id.* at 556. Given these facts, the Court declared, private suits to enforce procedural compliance with the Act were consistent with the Act's broad purposes. *Id.* at 57. The Court

explicitly analogized the issue that had been before it in the *Borak* case:

> We have previously held that a federal statute passed to protect a class of citizens, although not specifically authorizing members of the protected class to institute suit, nevertheless implied a private cause of action.

Id. at 557. The Court concluded that, unless private rights of action were permitted, the purpose of the Act, that no person be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, "might well prove an empty promise." *Id.* at 557.[6]

From these three cases—*Borak*, *Wyandotte*, and *Allen*—there emerges a doctrine of implied civil remedies that revolves around three questions:

(1) Does the plaintiff fall within the class that the statute was intended to protect?

(2) Is the harm that has occurred of the type that the statute was intended to forestall?

(3) Are the criminal or civil remedies explicitly provided adequate to ensure full effectiveness of the statute?[7]

When these tests are applied to the case at bar, the conclusion is inescapable, it is submitted, that this is a suitable case for the inference of a civil remedy.

Respondent, as a registered voter and corporate shareholder, is within the classes which Congress sought to protect. Since its first enactment in 1907, 34 Stat. 864, the prohibition against

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[6] Cf. Mr. Jutsice Harlan's view that whether an implied civil remedy should be recognized depends on whether the claimed "compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted." *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 407 (concurring opinion).

[7] At least two lower courts have adopted this formulation of the applicable tests. *National Association for Community Development* v. *Hodgson*, 356 F.Supp. 1399, 1403 (D.D.C. 1973); *Common Cause* v. *Democratic National Committee*, *supra*, 333 F.Supp. at 810-811.

corporate political donations has been intended to protect both voters' claims to the primary allegiance of their elected representatives and the right of shareholders to have their invested funds used solely for legitimate business purposes. In discussing the history of § 313 of the Corrupt Practices Act of 1925, 43 Stat. 1074, the predecessor of § 610, this Court found that:

> [The 1907] legislation seems to have been motivated by two considerations. First, the necessity for destroying the influence over elections which corporations exercised through financial contribution. Second, the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders.

United States v. *C.I.O.*, *supra*, 335 U.S. at 113. This dual purpose has been reaffirmed in the recent revisions of the statute effected by the Federal Election Campaign Act of 1971, Public Law 92-225, 86 Stat. 3. See 117 Cong. Rec. 43379-81 and 43384-85 (1971). Thus respondent falls squarely within each of the classes that § 610 was intended to protect.

In addition, the harm suffered by respondent is precisely the harm which § 610 and its predecessors were intended to prevent. Justice Frankfurter in *United States* v. *Auto Workers*, *supra*, 352 U.S. at 570-584, sets out at length the history of Congress' attempt to grapple with the problem of corporate money in politics. In this case, as in the past, corporate funds were apparently used to sway public opinion in favor of a particular candidate. And respondent's share of the corporate money, his investment, was used without his permission in aid of a candidate whom he did not support.

Finally, no other remedy will protect this shareholder's interest. Criminal prosecution of the corporation or its officials, even should it be undertaken (but see *infra*, pp. 24-28), will neither prevent the officials from repeating their illegal acts in the future nor return the money illegally taken from the corporation. If respondent is not entitled to the relief that he seeks, the broad remedial purposes of the statute, as outlined in *Auto Workers*, *supra*, will be defeated.

C. The Inference of a Civil Remedy Is Particularly Appropriate in the Case of a Statute, Like § 610, That Is Designed To Preserve the Integrity of the Electoral Process, Since Experience Teaches That Such Statutes Are Unlikely to be Effectively Enforced

A key test, as noted above, of whether a criminal statute is to be construed as impliedly providing a civil remedy for its infringement is whether the explicitly prescribed penal sanction adequately ensures achievement of the enactment's purposes. If it appears that it will not, an intent by the legislature to create a private civil remedy will be inferred absent clear evidence to the contrary. This test is particularly relevant in the case of a statute, like § 610, that is designed to preserve the integrity of the electoral process. For experience has taught that the penal sanctions of such statutes are unlikely to be effectively enforced.

That campaign financing laws, "corrupt practices" enactments, and similar statutes relating to the conduct of elections have rarely been criminally enforced is a generally acknowledged and widely deplored fact. As an observer of the political scene recently noted, "[t]he federal election laws—particularly those related to campaign financing—have gone openly and notoriously unenforced for more than 30 years." [8] The reason for this is apparent. As the same observer pointed out:

> An incumbent Attorney General has an obvious conflict of interest in investigating or prosecuting a campaign violation * * * by a member of his own Administration or party. And because of the "live and let live" principle of elective politics in countries with frequent transfers of power, the same conflict of interest also carries over to cases involving members of the opposition party.[*]

[8] Cutler, *Should We Have a Permanent Public Prosecutor?* (Outline of paper prepared for the Committee for Public Justice, appended to testimony by the author at Hearings before the Subcommittee on Separation of Powers, Committee on the Judiciary, United States Senate, 93d Cong., 2d Sess., on S. 2803 and S. 2978, March 26, 27, 28 and April 2, 1974, pp. 233, 363).

That the particular provision involved here, the prohibition against corporate campaign contributions, has gone practically unenforced over the years was alluded to at the recent Senate "Watergate" hearings. George Spater, a former chairman and chief executive officer of American Airlines, who had been the first of several corporate officers to confess to the Special Prosecutor that their respective corporations had made such prohibited contributions, related to the Ervin Committee the circumstances that had led him to effect such a payment. Hearings before the Select Committee on Presidential Campaign Contributions, United States Senate, 93d Cong., 1st Sess., Book 13, November 7, 8, 13, 14, and 15, 1973, pp. 5494-5521. Asked to account for his action in light of the prohibition against the practice "since 1910 or so," the witness said that he had yielded to pressure for a contribution (by the personal attorney for the President), but that

> [t]here is another element, of course, that for the first time since 1910 the law is being enforced. The law has been in effect for 60 years and has never been enforced until a special prosecutor was appointed.

Id., p. 5512.

The fact that campaign financing laws are rarely enforced has in effect been acknowledged by the Justice Department. In *Ralph Nader, et al.* v. *John N. Mitchell, et al.*, Civ. Action No. 243-72 (D.D.C. 1972), the defendant Attorney General submitted to the court, as an attachment to a pleading, Attorney General Brownell's Order No. 41-54, dated February 9, 1954, relating to "Elections, Election Campaigns, and Political Activity" Referring to the reporting provisions of the 1925 Corrupt Practices Act, requiring the filing of financial statements by political committees and candidates with the Clerk of the House of Representatives or the Secretary of the

[*] *Id.* See Hearings (preceding footnote), p. 364.

Senate, the Order stated that "[a]lthough the * * * provisions * * * carry a criminal penalty, they are, nevertheless, primarily administrative in nature," and that for that reason it was the policy of the Justice Department "not to institute investigations into possible violations of the laws in question in the absence of a request from the Clerk * * * or the Secretary * * *." [10] The Clerk of the House and the Secretary of the Senate, however, claimed in the same lawsuit that they had no duty to see that the law's requirements were complied with—that their only responsibility was to act as depositories for any reports that might be filed.[11]

The establishment, effective as of January 1, 1975, of an independent Federal Election Commission was due to the widely held conviction that the enforcement of the election laws had been inadequate. The Commission was created by § 310(a) of the Federal Election Campaign Act of 1971, Public Law 92-225, as amended by § 208(a) of the Federal Election Campaign Act Amendments of 1974, Public Law 93-443, 88 Stat. 1280. An unsuccessful attempt had been made to create such a Commission as part of the original 1971 Act. Supporters of such a provision had cited the failure of the earlier enforcement efforts as the prime justification for creation of such a Commission. *E.g.*, Senator Brooke observed during the debates on the 1971 bill that prior legislation dealing with elections had not "been adequately enforced over the years by the responsible officials of the Congress and the Justice Department" and that he therefore strongly supported a proposed amendment that "would create an independent Federal Elections Commission to supervise the enforcement of campaign laws" (117 Cong. Rec. 29004) (August 3, 1971). See also comments of Senator Prouty at 117 Cong. Rec. 29002. Similarly, in 1974, in criticizing a House bill to amend the 1971 Act for its failure to provide for such an independent Commission, Representative Frenzel noted that:

> Historically, campaign finance reform legislation has been a failure because of the lack of effective enforcement. The Corrupt Practices Act was almost never effective in its 50 year life. The failure of the Justice Department to prosecute in 1972 is widely known. No administration or enforcement agency that is in any manner politically encumbered has ever done an adequate, consistent job in administering and enforcing election law.
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> * * * * * * * *
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> * * * With a highly visible Commission, the public would expect and have confidence in nonpartisan, vigorous enforcement of the law.

H.R. Rept. No. 93-1239 to accompany H.R. 16090, 93d Cong., 2d Sess., p. 140 (Supplemental Views).[12]

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[10] Points and Authorities in Support of Motion to Dismiss of Defendant Attorney General and Defendant United States Attorney, Appendix A, pp. 3-4.

[11] See, *e.g.*, Points and Authorities in Support of Motion to Dismiss of Defendant W. Patrick Jennings, Clerk of the House of Representatives, pp. 3-4.

[12] Another statute, relating to the political process, that has never been adequately enforced is the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270. In 1970, the executive vice president of the American Society of Association Executives estimated that there were 3,500 nonprofit, multi-purpose associations to which the Lobbying Act might be applicable. Hearings before the Committee on Standards of Official Conduct, House of Representatives, 91st Cong., 2d Sess., on H. Res. 1031, October 1, 7, and 8, 1970, p. 127 ("Hearings"). Only 192 of those associations have registered pursuant to the Act. Cong. Rec. H8523 *ff.* (daily ed. August 16, 1974). Enforcing the provisions of the Act against these associations alone, therefore, would obviously be an enormous task, to say nothing of their enforcement against other covered individuals and entities. At present, the Department of Justice assigns only five attorneys to enforcement of the Lobbying Act, and these five, having numerous other responsibilities, work only part-time at this task. The situation is little different now from what it has been in past years. Not only are enforcement resources—in time, money, and manpower—in woefully short supply, but there is no effective mechanism to assure compliance with the Act. The Justice Department responds only to complaints by the Clerk of the House of Representatives. The Clerk,

This Court, as previously noted, in finding an implied private remedy in the Voting Rights Act of 1965, observed that "[t]he achievement of the Act's laudable goal could be severely hampered * * * if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." *Allen* v. *State Board of Elections, supra,* 393 U.S. at 556. Cf. *J. I. Case Co.* v. *Borak, supra,* 377 U.S. at 432; *Wyandotte Transportation Co.* v. *United States, supra,* 389 U.S. at 202. This rationale, clearly, is even more pointedly relevant in the case of a statute, like § 610, that is designed to preserve the purity of the electoral process—for experience has shown, as above indicated, that the Attorney General rarely enforces statutes of this type at all.

D. There Are No Countervailing Reasons for Not Inferring a Civil Remedy Here

1. *That Congress, in Title III of the Federal Election Campaign Act of 1971, provided an express civil remedy for violation of that Title's provisions, but in Title II, though it amended § 610, did not similarly provide a civil remedy for its breach, is not a valid basis for inferring, under the "expressio unius" rule of construction, that Congress intended that violation of § 610 should be irremediable civilly*

Petitioners' and Judge Aldisert's reliance on this Court's decision in *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453 (1974) (the "*Amtrak*" case), and on the rule of construction, "*Expressio unius est exclusio alterius,*" on which that decision was based, is, we submit, misplaced.

In that case the respondent, the National Association of Railroad Passengers, a private association composed of pa-

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however, holds to the view that he has no authority under the Act to refer apparent violations to the Justice Department for investigation—that he has "no enforcement powers" and acts "just more or less [as] a depository for voluntary information * * *". Hearings, p. 121.

trons of the railways, had sued to enjoin the National Railroad Passenger Corporation ("Amtrak") from discontinuing certain passenger trains, on the ground that the proposed discontinuations were unauthorized by the Rail Passenger Service Act of 1970, 84 Stat. 1327, 45 U.S.C. § 501 *et seq.* (the "Amtrak" Act). Section 307(a) of that Act, 45 U.S.C. § 547 (a), provided so far as relevant that:

> If the Corporation [Amtrak] or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this Act, * * * refuses, fails, or neglects to discharge its duties and responsibilities under this Act, or threatens any such violation, * * * refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, * * * *upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby,* * * * to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat. [Emphasis added]

The district court had dismissed the action and this Court, in reliance on the above-emphasized language of § 307(a), ruled that the dismissal had been proper. Referring to the "frequently stated principle of statutory construction * * * that when legislation expressly provides a particular remedy or remedies, the courts should not expand the coverage of the statute to subsume other remedies"—which principle, it was noted, reflected the ancient maxim that "*expressio unius est exclusio alterius*"—the Court held that, aside from the specifically excepted situation of a dispute involving a labor agreement, the only civil cause of action authorized by the Act was the public one mentioned, by and in the name of the Attorney General (414 U.S. at 456-458). "Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances," the Court noted, "this maxim would clearly compel the conclusion that the remedies created in

§ 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act." *Id.* at 458.

The *Amtrak* decision, thus, it is clear, is readily distinguishable from this case. What made the *expressio unius* rule relevant in that case was that the Amtrak Act expressly provided a civil remedy for violation of its provisions—a remedy which, because it was public in nature, was held to have impliedly barred the private remedy that had there been invoked. 18 U.S.C. § 610, on the other hand, the statute involved here, contains no *express* provision for *any* civil remedy. Its only express sanction is the penal one of fine or imprisonment—and it is well settled, as we have seen, that the fact that a statute makes defined conduct punishable not only does not preclude, but is precisely the basis for, the implication of a private civil remedy. This case, in short, differs from *Amtrak* precisely in the respect on which the holding there turned. As the majority below noted, "For the *Amtrak* rule to apply, the statute must expressly provide * * * a remedy that logically may be said to be exclusive" (496 F.2d at 421).

Petitioners contend (Pet. Br. 23-27), however, and Judge Aldisert was of the view, that despite this critical difference between the two cases the *Amtrak* decision, and particularly its *expressio unius* rationale, requires reversal of the court of appeals' judgment. They rely on a comparison of the provisions of Titles II and III of the Federal Election Campaign Act of 1971 ("FECA"), Public Law 92-225, 86 Stat. 3. The claim, we submit, is without merit.

Title *III* of the Act, 2 U.S.C. § 431 *et seq.* (1970 ed., Supp. III), was a comprehensive, carefully integrated, and largely new set of provisions relating to the reporting and disclosure of campaign contributions and expenditures. It made no reference whatever to § 610. The sole provision claimed to be relevant, § 308(d)(1), 2 U.S.C. § 438(d)(1), provided an express civil remedy for violation of the Title's substantive

commands and prohibitions.[13] The Section, which supplemented the Title's penal provisions (contained in § 311, 2 U.S.C. § 441), provided in relevant part that anyone who believed that a violation of any provision of the Title had occurred might file a complaint with a designated official (called the "supervisory officer"[14]), and that whenever in that officer's judgment (after notice and opportunity for hearing) any person had engaged or was about to engage in any acts or practices that constituted or would constitute a violation of any provision of the Title,

> the Attorney General on behalf of the United States shall institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the person is found, resides, or transacts business. * * *

The Section, in short, provided for a public cause of action, to be brought by the Attorney General, essentially similar to the public civil remedy involved in the *Amtrak* case, *supra*.

Title *II* of the Act, 86 Stat. 8, was unlike Title III in that (among other things) it did not purport to establish any comprehensive, or new, or self-contained body of rules on any subject. Captioned "Criminal Code Amendments," the Title effected what the caption suggested it was intended to accomplish—it amended in various respects a miscellany of Criminal Code sections. Its sole alleged pertinence lies in the fact that 18 U.S.C. § 610, the statute involved here, was one of the sections so amended. It is pertinent to note, moreover, that the amendment of § 610 consisted, not of a revision, or rewriting, of the Section, but of the addition of a new

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[13] Section 308(d)(2)-(5), 2 U.S.C. § 438(d)(2)-(5), contained ancillary provisions defining incidents of the civil remedy authorized.

[14] The "supervisory officer" was defined in § 301(g), 2 U.S.C. § 431(g), to mean the Secretary of the Senate, the Clerk of the House of Representatives, or the Comptroller-General, depending upon the office to which the candidate involved aspired.

paragraph (its fourth) explanatory of a phrase, "contribution or expenditure," used in the Section. The sole purpose of the amendment, its legislative history shows, was to codify existing case law as to the meaning of the phrase. 117 Cong. Rec. 43379-43391 (1971). The amendment, it should be stressed, has no present relevance beyond the suggested significance of what it did *not* do.

Petitioners and Judge Aldisert read significance into the fact that Congress, on the one hand, in Title III of the Act, provided an express civil remedy for violation of that Title's provisions, but failed, on the other hand, in Title II of the Act, though it amended § 610, to provide a civil remedy for violation of *it*. In reliance on the *expressio unius* maxim, they contend that Congress' provision for the remedy in the one situation and its silence as regards it in the other reflect a deliberate legislative judgment that there should be *no* civil remedy for violation of § 610. The reasoning, we submit, is unpersuasive.

The express provision in Title III for a public civil action for violation of that Title's commands "may well bar inference," as the majority below remarked, of a *private* remedy for violation of *those* commands (496 F.2d at 421-422 n. 4). This Court, indeed, in *Amtrak*, in a similar legislative context, held just such inference to be unwarranted. Clearly, however, it is an entirely different thing to suggest that the Title III remedy provision can plausibly be said—because Congress, in another Title, amended in a minor respect a long-standing Criminal Code section without addressing itself in that instance to remedy considerations—to evidence a deliberate determination by Congress that violation of the Code section should not be remediable civilly. There simply is no basis, we submit, for an *expressio unius* inference in such a context. Like the majority below, we

> do not * * * believe that any intent to bar the remedies sought here can be inferred from the 1971 Act's grant of a civil, as well as a criminal, action for violation of conduct first proscribed in 1971 and its failure to grant any civil remedies for conduct prohibited since 1907. Amtrak certainly does not require that such an inference be drawn from the 1971 Act's amendment of longstanding criminal provisions coincidentally joined, albeit in separate titles, with promulgation of new civil and criminal actions.

496 F.2d at 422 n. 4.[15]

[15] Petitioners' and Judge Aldisert's reliance on *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959), another decision of this Court in which the Court applied the *expressio unius* maxim to ascertain the meaning of a statute, is also mistaken. There, the Court declined to find in the Motor Carrier Act of 1935 (Part II of the Interstate Commerce Act) an implied right on the part of shippers, in suits by carriers to collect transportation charges, to defend on the ground that the charges were unreasonable. The Court, noting that the provisions of Parts I and III of the Interstate Commerce Act, relating to rail and water carriers, respectively, granted an express right to shippers to litigate the reasonableness of past charges notwithstanding that the charges were based on the applicable and effective filed rates, emphasized that similar provisions were conspicuously absent in Part II (359 U.S. at 470-471). That no such clean-cut basis for application of the *expressio unius* rule of construction is involved in this case sufficiently appears from the discussion, above, of the claimed justification for the rule's application here. Moreover, as the Court further emphasized in the *T.I.M.E.* case, the Interstate Commerce Commission had itself consistently recognized that nothing in Part II of the Act created a statutory liability on the part of the carrier for past allegedly unreasonable filed rates (the liability the shipper had sought to have recognized in that proceeding), and, even more significantly, prior efforts to amend Part II to provide a remedy similar to that recognized in the other two Parts had consistently been rejected (359 U.S. at 471-472). Obviously nothing remotely comparable to those aspects of the *T.I.M.E.* decision is involved here. Finally it should be noted that *T.I.M.E.* involved a situation, unlike that of this case, in which "the substantive prohibitions of the statute," relied on by the party claiming the implied remedy, were "inextricably intertwined with provisions defining the powers and duties of a specialized administrative body charged with its enforcement" (*Holloway* v. *Bristol-Myers Corporation*, 485 F.2d 986, 989 (D.C. Cir. 1973)). Judicial inference of a private civil remedy for violation of a statutory duty may properly be more cautious in such a context than where, as here, no specialized administrative body charged with the statute's enforcement is involved.

2. *Such light as is thrown by the Federal Election Campaign Act Amendments of 1974 on Congress' intent as to § 610 when it enacted Titles II and III of the 1971 Act refutes rather than supports the "expressio unius" claim based on those Titles*

The Federal Election Campaign Act Amendments of 1974 ("FECA Amendments"), Public Law 93-443, 88 Stat. 1263, were enacted into law on October 15, 1974, and became effective January 1, 1975 (§ 410, 88 Stat. 1304). The new law broadly amends the 1971 FECA, including the latter Act's aforediscussed Title III (§§ 201-210, 88 Stat. 1272-1289).[16] Since the FECA Amendments were not passed until after the court of appeals' decision in this case, they of course have no direct impact on these proceedings. We agree, nevertheless, with petitioners (Pet. Br. 28) that it is appropriate to consider in this case whatever "cross light"[17] the later enactment, *in pari materia* with the FECA, may throw on the intent of Congress in enacting the earlier legislation. *Pipefitters* v. *United States*, 407 U.S. 385, 427 (1972); *Michigan National Bank* v. *Michigan*, 365 U.S. 467, 481 (1961). We disagree, however, with the apparent contention of petitioners that the light thrown by the FECA Amendments supports their principal claim—that by Titles II and III of the 1971 Act Congress evinced the intention that violations of § 610 should be irremediable civilly (Pet. Br. 27-33). In our view the 1974 Amendments, to the extent they are relevant, refute rather than support that suggestion.

Ibid. Section 610, as the majority below noted, "does * * * [not] involve the operation of a regulatory agency whose policy determinations on this or other matters might be threatened by allowing private enforcement" (406 F.2d at 424).

[16] The only direct amendment of § 610 effected by the new Act was to increase the penalties for its violation (§ 101(e)(1), 88 Stat. 1267).

[17] *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945) (L. Hand, J.).

Title III of the FECA, as amended by the 1974 Amendments, provides for a Federal Election Commission ("the Commission"), to be composed of two *ex officio* members (the Secretary of the Senate and the Clerk of the House of Representatives) and six members to be appointed as therein provided (§ 310(a), 88 Stat. 1280). The Commission has the functions, generally, of the "supervisory officer[s]" provided for by the Title as it previously read (see p. 31, *supra*). Section 310 (b) of the amended Title, 88 Stat. 1281, provides that the Commission shall administer, seek to obtain compliance with, and formulate policy with respect to "this Act and sections 608, *610*, 611, 613, 614, 615, 616, and 617 of title 18, United States Code" and that it has "primary jurisdiction" with respect to the "*civil enforcement* of such provisions" (emphasis added).

Section 314(a)(1)(A) of the amended Title, 88 Stat. 1284, provides that any person who believes a violation of "this Act" or of any of the eight mentioned Criminal Code sections has occurred may file a complaint with the Commission. Section 314(a)(2), 88 Stat. 1284, provides that, upon receiving a complaint, the Commission shall notify the person involved of the apparent violation and either report the same to the Attorney General or conduct an investigation of it. Section 314(a)(5), 88 Stat. 1284, provides that if the Commission determines, after investigation, that there is reason to believe that any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of the Act, it may endeavor to correct the violation by informal methods of conference, conciliation, and persuasion; and that if the Commission fails to correct the violation through informal methods, it "may insititute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business." Section 314(a)(6), 88 Stat. 1284, provides that the Commission shall refer apparent violations of chapter 29 of Title 18 of the United States Code (which contains the eight designated sec-

tions) to the appropriate law enforcement authorities. Section 314(a)(7), 88 Stat. 1285, provides that whenever in the judgment of the Commission (after notice and opportunity for a hearing) any person has engaged or is about to engage in any acts or practices that constitute or will constitute a violation of any provision of the Act or of any of the eight Criminal Code sections,

> upon request by the Commission the Attorney General on behalf of the United States shall institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the person is found, resides, or transacts business. * * *[18]

Paragraphs (8)-(11) of the same subsection, 88 Stat. 1285, define additional incidents of the judicial remedy thus authorized. The Commission thus may either file a civil lawsuit on its own initiative or request the Attorney General to do so.[19]

It thus appears that Title III as amended continues the Title's original civil remedy provisions—with the changes above noted—and *extends the provisions to violations of § 610* (and of the other indicated Criminal Code sections).[20] Whereas, in other words, the original civil remedy provisions

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[18] Cf. § 308(d)(1) of the Title as it read prior to its amendment (*supra*, p. 31).

[19] The only provision of the amended Title authorizing a direct private action by an individual in a district court is § 315(a), 88 Stat. 1285, which permits the Commission, the national committee of any political party, or "any individual eligible to vote in any election for the office of President of the United States" to "institute such actions in the appropriate district court * * * as may be appropriate to *construe the constitutionality of* this Act or of [any of the eight designated Criminal Code sections]" (emphasis added).

[20] The legislative history of the 1974 Amendments indicates that private civil actions have not been precluded, but only that individuals must exhaust their administrative remedies before filing such suits. H.R. Rept. No. 93-1438, 93d Cong., 2d Sess., p. 94 (Conference Report).

applied only to violations of the commands of Title III itself, the provisions as amended apply to violations of § 610 as well.[21] This hardly suggests, it is submitted, that Congress, in 1971, when it enacted Titles II and III, impliedly intended that violation of § 610 should be civilly irremediable (petitioners' and the dissent's basic *expressio unius* argument). It is unlikely, in other words, that Congress, in 1971, meant impliedly to legislate that there should be no civil remedy for violation of § 610—and that in 1974, changing its mind, it decided to provide that such violations should be remediable. The more reasonable inference, it is suggested, is that when Congress, in 1971, expressly made Title III violations civilly remediable, but said nothing, in Title II, about the remediability of § 610 violations, the explanation for its silence in the latter regard was simply that it did not consider § 610 at that time from a remediability standpoint. (The sole purpose of the 1971 amendment of § 610, as pointed out above, was to codify existing case law as to the meaning of a phrase, "contribution or expenditure," used in the Sec-

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[21] If the 1974 Amendments had been in effect when respondent started this lawsuit, he would have been required, it may be noted parenthetically, under the rationale of the *Amtrak* case, to pursue the civil remedy procedures now prescribed. He would have been required, that is to say, instead of suing in the district court, to make his complaint in the first instance to the Federal Election Commission, which body, if satisfied of the complaint's validity, could have requested the Attorney General, "on behalf of the United States," to institute a civil action for relief. The Attorney General, in that event, would have been bound to file such an action. Cf. § 314 (a)(1)(A) and (7) of amended Title III, mentioned *supra*. Respondent, in other words, had the new Amendments been law when he initiated this suit, would have been required to rely (so far as judicial relief is concerned) on the *public* civil remedy procedures now applicable. But since the Amendments were not in existence when respondent commenced this proceeding, their provisions obviously are inapplicable. Since respondent's suit, under the implied civil remedy doctrine, was proper when it was instituted, it cannot now be deemed invalidated on the basis of provisions that had at that time not yet been enacted.

tion.) Then later, in 1974, when Congress addressed the specific issue, it decided to include violations of § 610—as well as violations of the other Code sections—within the Title's remedy provisions.[22]

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[22] Judge Aldisert, noting respondent's concession below that the legislative history of § 610 does not refer to a private civil remedy, was of the view that that concession was dispositive (496 F.2d at 428-429). Petitioners also make this contention (Pet. Br. 27). Judge Aldisert's conclusion, however, was based on two statements by this Court in the *Amtrak* case, *supra*, which, read in context, in no way support the conclusion the judge drew from them. The Court said in *Amtrak* that "the inference of * * * a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act" (414 U.S. at 458). The Court further stated that "the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent" (*ibid.*). Judge Aldisert, blending segments of the two observations, said he was convinced that the Court had

> meant exactly what it said when it declared that a "private cause of action not otherwise authorized by the statute" may not be implied in the absence of clear "evidence of legislative intent."

496 F.2d at 429. It is evident, however, that the statements of the Court which the judge thus combined and partly quoted do not bear the meaning attributed to them. The Court neither said nor implied that a private cause of action not otherwise authorized by the statute may not be inferred in the absence of clear evidence of legislative intent. Nor is this surprising since the Court, in the *Wyandotte* case, *supra*, had indicated, quite contrariwise, that where recognition of an implied civil remedy will further the purposes of an enactment, such a remedy will be inferred *unless* a clear contrary intent is discoverable (389 U.S. at 200-201). Cf. *Stewart* v. *Travelers Corporation, supra*, 503 F.2d at 110-111 n. 7. Discovery, in other words, from the legislative history or elsewhere, that Congress intended that there be no civil remedy will preclude the inference of such a remedy by the courts, however otherwise appropriate one might seem. This is not to say, however, contrary to Judge Aldisert's suggestion, that the legislative history must contain clear evidence that Congress intended such a remedy before the courts can infer one. As the majority below noted, finding an implied cause of action pursuant to the criteria established by this Court's decisions

> is not entirely an exercise in divining legislative intent. Certainly, legislative intent is relevant; where the legislature clearly has indicated its intent to grant or withhold a cause of action, implicitly or explicitly, courts will give effect to that intent. [Citing *Amtrak*] Absent some reasonably clear indication of legislative attention to the possible creation of a cause of action, however, courts ascertain the policies underlying the substantive law and determine the propriety, as a means of effectuating those policies, of affording litigants a particular remedy. [Citing, *inter alia*, *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), 395-397 (opinion of the Court), and 402-403 n. 4 (Harlan, J., concurring)]

496 F.2d at 421.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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